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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

JUAN MARTIN ZAPATA,

Defendant and Appellant.

F075687

(Super. Ct. No. CRM033859)

OPINION

APPEAL from a judgment of the Superior Court of Merced County. Ronald W. Hansen, Judge.

William J. Capriola, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, Louis M. Vasquez and Ian Whitney, Deputy Attorneys General, for Plaintiff and Respondent.

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A jury convicted appellant Juan Martin Zapata of attempted murder with an enhancement for use of a firearm (Pen. Code, §§ 187, subd. (a), 664, 12022.53,

SEE CONCURRING OPINION

subd. (d);[1] count 1); assault with a firearm with enhancements for use of a firearm and for personally inflicting great bodily injury (§§ 245, subd. (a)(2), 12022.5, subd. (a), 12022.7, subd. (a); count 2); and being a felon in possession of a firearm (§ 29800, subd. (a)(1); count 3). In bifurcated proceedings, the court found Zapata had suffered a prior strike and prior serious felony conviction. (§§ 667, subds. (a)(1), (b)–(j), 1170.12, subds. (a)–(d), 1192.7, subd. (c).) The court sentenced Zapata on count 1 to an aggregate term of 48 years to life. Sentence on the remaining counts was stayed.

On appeal, Zapata challenges his counsel's failure to take further action in response to the court's limitation of his expert witness's testimony regarding eyewitness identification. He further challenges the court's admission of a jail phone call as an adoptive admission. We reject these challenges.

However, we conclude the matter must be remanded for the trial court to consider exercise of its recently afforded discretion to strike the firearm and prior serious felony enhancements, and to afford Zapata an opportunity to make a record of youth-related factors relevant to his eventual youth offender parole hearing.

In all other respects, we affirm.

FACTUAL AND PROCEDURAL BACKGROUND

On October 25, 2012, shortly after 8:00 p.m., Gregory R.[2] was shot multiple times in front of his home in the city of Delhi. The identity of the shooter was the primary issue disputed at trial.

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[1] All further statutory references are to the Penal Code, unless otherwise noted.

[2] To preserve the privacy of the victim and percipient witnesses, we refer to them by first name. No disrespect is intended.

The Prosecution's Case

On the night of the shooting, Gregory was on his parents' front porch with his friends, Roberto R. and Franklin M., drinking and smoking marijuana. His mother, father, two sisters, two sons, and long-term girlfriend, Arianna G., were inside the home.

At some point in the evening, a car pulled up near the house and idled there for a few minutes. Gregory saw the car lights and went to see who it was. He walked down his front walkway, saw Zapata in the driveway, and asked him, "What's up?" Zapata looked scared when he saw Gregory. Gregory asked Zapata where his brother was and Zapata responded, "Oh, at the house." Zapata walked backwards down the driveway until he reached the sidewalk, where he pulled out a gun and pointed it at Gregory.

Gregory said, "What the fuck?" and raised his hands. Zapata just stared at him. Gregory then noticed Roberto coming around the walkway. Roberto said, "Hey Greg, he has a gun." Roberto could not see the gunman's face. Zapata momentarily focused on Roberto and lowered the gun, and Gregory took the opportunity to run toward the house. Roberto ran around the block and called 911. Franklin remained near the front door.

Zapata fired on Gregory as he ran, striking him from behind multiples times in the left thigh and the back. Gregory was struck again in the foot as he tried to open the front door.[3] He eventually stumbled through the door and his father helped pull him inside. When his father and Arianna asked who shot him, Gregory responded, "San Junero."

Sheriff's Deputy Adam Leuchner subsequently arrived at the scene. He saw Gregory lying on the floor bleeding from several gunshot wounds. Gregory was unable to provide a full statement at that time.

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[3] Gregory suffered gunshot wounds to his abdomen, back, left buttock, right foot, and left thigh. As a result, one of his kidneys was removed. He was unable to walk for approximately six months after the shooting and still had difficulty walking and carrying his children at the time of trial.

At the home, sheriffs found bullet holes in the glass front door, a couch, a tennis shoe, and a wall. Bullets were recovered from near the front door, on the couch, and near the refrigerator. Seven shell casings were found along the front walkway.

Arianna told police that "San Junero" is Spanish for "someone from San Jose." She told the police she knew the person Gregory was referring to and was able to describe him. A detective showed her a photograph of Zapata and she identified him as the person she knew as San Junero. Gregory later identified Zapata as the shooter from a photo array. Both Arianna and Gregory identified Zapata in court and testified they knew him by the nickname San Junero. Zapata himself told Gregory this nickname. Arianna had heard Zapata's family and friends call him by that name.

Gregory and Arianna knew Zapata through his brother Jose, who they hung out with when they lived near each other in Turlock. They also hung out with Zapata on a handful of occasions. In the few days immediately before the shooting, Zapata came to Gregory's house in Delhi twice. The first time, Zapata asked Gregory to go somewhere with him and Gregory declined. A few days later, Arianna went outside looking for Gregory and saw him talking to Zapata. Zapata looked scared when Arianna came out and he quickly left.

Zapata's brother, Jose, testified he and Zapata used to live near Gregory in Turlock. Jose would see Gregory at the park and they would smoke together but they were not friends. He had seen him no more than five times. Jose had never seen Zapata with Gregory. Jose denied Zapata goes by the nickname San Junero. However, he testified Zapata was born in San Jose.

An expert in wireless technology testified that, at 7:40 p.m., Zapata's cell phone received a text message from a cell tower located in the city of Turlock, five to eight miles from where the shooting occurred. Zapata received a call at 8:02 p.m. and another at 8:47, both from cell towers located in Turlock. On October 27, 2012, Zapata's phone

received calls from a cell tower in San Jose. There was no record of Zapata's phone having sent or received calls or texts from the cell tower located in Delhi.[4]

In a jail call made a few days after the shooting, an unnamed woman spoke with Zapata and told him she had run into someone who knew him. The person reportedly said to her, "oh you know so-and-so, you know San Jonedo." She asked the person for San Jonedo's "government name" and the person responded, "Martin Zapata." Zapata then asked, "Who said that?" and the caller described the person she had spoken with. Zapata then remembered spending time with that person in Oakland.

Defense Case

Sergeant Buck Ledford testified about his investigation of the shooting. He testified regarding his interview of Arianna at the scene and his later interview of Gregory at the hospital. He testified that Gregory reported San Junero was with a girl on the night of the shooting and Gregory had been told the girl said something to the effect of "Don't do it." Gregory also told Sergeant Ledford that he and San Junero "didn't really talk" on the night of the shooting and Gregory did not mention asking the individual where his brother was or putting his hands up after the gun was pointed at him. Sergeant Ledford testified that Zapata was the only person with a ponytail in the photo array he showed Gregory and that another individual was included in the array twice. Sergeant Ledford did not recall whether he had given Gregory a standard admonition regarding the photo array and he told Gregory beforehand he believed they had identified San Junero.

Deputy Leuchner testified that Roberto reported Gregory and the person in the driveway conversed for a few minutes but Roberto could not hear what it was about.

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[4] The prosecution argued this evidence was consistent with Zapata having been in Turlock, only a few miles from Delhi, immediately before and after the shooting. The prosecution also argued Zapata's failure to respond to text messages around the time of the shooting was consistent with him having been the shooter.

Roberto also told police that the person raised his gun at Gregory but then lowered it, and the conversation resumed. Roberto did not tell police that the person pointed the gun at him. Deputy Leuchner also testified that Arianna told him San Junero had a dark complexion and she was not specific about the number of times she or Gregory met San Junero.

The defense played a 911 call from an uninvolved eyewitness named Candice M. In the call, Candice stated she witnessed the shooting while passing the scene. She described the shooter as wearing a dark beanie and described his vehicle as a newer Honda. She sped out of the area after witnessing the shooting. At trial, Candice testified it was very dark at the time of the shooting and she could not see the person holding the gun. As she sped away from the scene, she noticed the car that had been parked in front of the house was following behind her, but it eventually turned in a different direction. Candice had been driving a dark grey Suburban.

The defense also played Roberto's 911 call. In the call, Roberto stated that Gregory had been shot by someone in a green truck.

The defense also played a 911 call made by Gregory's mother. At least two unidentified voices could be heard in the background. When asked by the operator if Gregory knew who "did this," his mother responded, "He didn't. You didn't see them, huh? You don't know who it was, huh? I need … I need an ambulance." She then passed the phone to an unidentified male who reported seeing a big SUV, like a Suburban, that was navy blue in color. A female in the vehicle was saying, "No. No. No."

The defense recalled Gregory as a witness and Gregory recounted the events leading up to the shooting. Gregory again identified Zapata as the shooter.

DISCUSSION

I. Challenges to Identification Evidence

Prior to testimony from the defense expert witness on eyewitness identification, the People moved to exclude testimony regarding "faulty witness ID's being a leading cause of wrongful convictions … as shown by DNA exonerations." Defense counsel stated he would like to offer such evidence. The court ruled information regarding DNA exonerations is "in the newspapers" and a matter of common knowledge, and therefore not a proper subject of expert testimony. However, the court indicated testimony relating to "issues of perception and what can impact perception, stress, et cetera, retention, how the mind and memory functions and works to try to make sense of things, and then expressing those memories" would be a proper subject of expert testimony. Defense counsel disagreed with the court's assessment, but the court granted the People's motion and prohibited the expert from referring to "those things," i.e., instances of faulty identification leading to wrongful conviction and DNA exoneration. As a result, defense counsel elected not to call the expert as a witness.

Zapata contends defense counsel was ineffective for failing to take further action to address eyewitness identification issues by making an offer of proof as to the expert's testimony, moving to suppress the photo array identification, or proffering a jury instruction similar to a model instruction developed in Massachusetts.[5] We disagree.

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[5] Although not raised as a point of error, Zapata contends in passing that the court was wrong to limit his expert's testimony: "[T]he trial court was simply wrong that what appears in the communications media would be sufficient to educate the jury about the counter-intuitive realities of eyewitness identification and that expert testimony … [was] not necessary or permissible." Zapata misconstrues the court's ruling. The court did not preclude the expert from testifying regarding the "counter-intuitive realities of eyewitness identification." The court ruled only that the defense expert would not be permitted to testify regarding other cases in which eyewitness identification was subsequently refuted by DNA evidence. Zapata presents no argument or authority to support the admissibility of such testimony. (*People v. Crittenden* (1994) 9 Cal.4th 83, 153 (*Crittenden*).) In any event, we find no abuse of discretion. (*People v. Gonzalez* (2006) 38 Cal.4th 932, 944

A. Applicable Legal Standards

" '[A] defendant claiming a violation of the federal constitutional right to effective assistance of counsel must satisfy a two-pronged showing: that counsel's performance was deficient, and that the defendant was prejudiced, that is, there is a reasonable probability the outcome would have been different were it not for the deficient performance.' " (*People v. Woodruff* (2018) 5 Cal.5th 697, 736 (*Woodruff*).) We consider whether " ' " 'counsel's representation fell below an objective standard of reasonableness under prevailing professional norms.' " ' " (*People v. Johnson* (2016) 62 Cal.4th 600, 653 (*Johnson*).) A reviewing court "need not determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies." (*Strickland v. Washington* (1984) 466 U.S. 668, 697.)

B. Offer of Proof

Zapata contends defense counsel should have made an offer of proof regarding his expert's anticipated testimony. This contention is not supported by argument or authority. (*Crittenden, supra*, 9 Cal.4th at p. 153.) Furthermore, the record already reflects the precise testimony the court excluded: testimony regarding faulty identifications leading to wrongful conviction and DNA exoneration. We discern no basis for a further offer of proof in this regard. Nor does Zapata articulate how he was prejudiced by this alleged failure.

To the extent Zapata contends his counsel should have made an offer of proof regarding his expert's *other* proposed testimony, Zapata's counsel was not ineffective. The court did not limit the expert's testimony in any other way. Zapata was free to call

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[expert testimony permissible only when related to a subject that is "sufficiently beyond common experience that the opinion of an expert would assist the trier of fact"]; *People v. Robinson* (2005) 37 Cal.4th 592, 630 [applying abuse of discretion standard to ruling on expert testimony].)

his expert to testify to the "counter-intuitive realities of eyewitness identification." Indeed, the court suggested testimony on factors affecting perception and memory would be proper. No offer of proof was required for such testimony, and Zapata was not prejudiced by his counsel's failure in this regard.

Finally, to the extent Zapata's arguments can be read to challenge his counsel's failure to call an eyewitness identification expert, the record is insufficient for us to conclude counsel was ineffective. The reason for defense counsel's decision is not disclosed in the record. (See *Woodruff, supra,* 5 Cal.5th at p. 736 ["Rarely is ineffective assistance of counsel established on appeal since the record usually sheds no light on counsel's reasons for action or inaction."].) Where the record fails to disclose the reason for counsel's challenged action or inaction, we must affirm " ' "unless counsel was asked for an explanation and failed to provide one, or unless there simply could be no satisfactory explanation . . . ." ' " (*Johnson, supra,* 62 Cal.4th at p. 653.) Although the identity of the shooter was in dispute, we cannot say there was no satisfactory explanation for defense counsel's decision not to call an eyewitness identification expert once he learned he could not question the expert regarding wrongful convictions and DNA exonerations. For example, defense counsel may have made a tactical determination that testimony regarding the vagaries of perception and memory would be unpersuasive in this context, where the victim claimed the shooter was well-known to him. We therefore reject any claim counsel was ineffective in this regard. (*People v. Ledesma* (2006) 39 Cal.4th 641, 746 ["As we repeatedly have emphasized, unless the record reflects the reason for counsel's actions or omissions, or precludes the possibility of a satisfactory explanation, we must reject a claim of ineffective assistance raised on appeal."].)

C. Suppression of Photo Array Identification

Zapata contends his counsel was ineffective for failing to move to suppress Gregory's photo array identification. This argument is not supported by argument or authority. We therefore need not consider it. (*Crittenden*, *supra*, 9 Cal.4th at p. 153.)

Regardless, the argument is without merit. We cannot say that counsel's performance fell below an objective standard of reasonableness because we are unconvinced a motion to suppress the identification would have been successful. (See *Johnson*, *supra*, 62 Cal.4th at p. 653.) "In order to determine whether the admission of identification evidence violates a defendant's right to due process of law, we consider (1) whether the identification procedure was unduly suggestive and unnecessary, and, if so, (2) whether the identification itself was nevertheless reliable under the totality of the circumstances . . . ." (*People v. Cunningham* (2001) 25 Cal.4th 926, 989.) "The defendant bears the burden of demonstrating the existence of an unreliable identification procedure." (*Ibid.*) The totality of the circumstances must reflect a substantial likelihood of " 'irreparable misidentification' " to warrant reversal on this ground. (*Id.* at p. 990.)

Zapata complains he was the only individual with a ponytail pictured in the photo array and one other individual was pictured twice. He also complains that Gregory was informed before the identification that law enforcement believed they had identified San Junero. However, we have no basis to conclude any aspect of the photo array caused Zapata to " ' "stand out" from the others in a way that would suggest the witness should select him.' " (*Cunningham*, *supra*, 25 Cal.4th at p. 990.) Nor do we find a substantial likelihood of irreparable misidentification. By the time Gregory was presented with the photo array, he had already identified the shooter as the person known to him as San Junero. He knew San Junero socially as the brother of Jose, his former neighbor. Jose confirmed Zapata is his brother and they both previously lived near Gregory in Turlock. Under the totality of the circumstances, Gregory's identification of Zapata is supported by other evidence and is sufficiently reliable to have been admitted.

D. Jury Instruction on Eyewitness Identification

The jury was instructed with CALCRIM No. 315 as follows:

You have heard eyewitness testimony identifying the defendant. As with any other witness, you must decide whether an eyewitness gave truthful and accurate testimony.

In evaluating identification testimony, consider the following questions:

- Did the witness know or have contact with the defendant before the event?

- How well could the witness see the perpetrator?

- What were the circumstances affecting the witness's ability to observe, such as lighting, weather conditions, obstructions, distance, and duration of observation?

- How closely was the witness paying attention?

- Was the witness under stress when he or she made the observation?

- Did the witness give a description and how does that description compare to the defendant?

- How much time passed between the event and the time when the witness identified the defendant?

- Was the witness asked to pick the perpetrator out of a group?

- Did the witness ever fail to identify the defendant?

- Did the witness ever change his or her mind about the identification?

- How certain was the witness when he or she made an identification?

- Are the witness and the defendant of different races?

- Was the witness able to identify the defendant in a photographic or physical lineup?

- Were there any other circumstances affecting the witness's ability to make an accurate identification?

> The People have the burden of proving beyond a reasonable doubt that it was the defendant who committed the crime. If the People have not met this burden, you must find the defendant not guilty.

Zapata contends his counsel was ineffective for failing to request an additional instruction on factors he contends the jury should have considered in evaluating Gregory's photo array identification, including the number of photographs shown, whether anything about the defendant's appearance in the photograph made him stand out from the others, and whether the person showing the photographs knew the identity of the suspect and could have influenced the identification.

We do not find, and Zapata does not cite, any California case requiring or permitting such instruction on photographic identifications. While Zapata correctly points out that a defense attorney's presentation of new and evolving scientific information can lead to changes in accepted legal standards, a claim of ineffective assistance requires a showing that counsel failed to perform at an objective standard of reasonableness under then-prevailing professional norms. (*Johnson, supra*, 62 Cal.4th at p. 653.) We cannot say the failure to request further instruction was professionally deficient.

Furthermore, the jury was instructed to consider "any other circumstances affecting the witness's ability to make an accurate identification." Defense counsel questioned Sergeant Ledford regarding the identification procedure and referred to alleged irregularities in the photo array during closing argument. The jury was alerted to these issues and was instructed that "any other circumstances" affecting an adequate identification were proper matters for their consideration. Defense counsel was not ineffective in his manner of bringing this issue before the jury.

E. Prejudice

Even if counsel's performance was deficient for all the reasons cited by Zapata, there is no reasonable probability the outcome of the proceeding otherwise would have been different. (*People v. Mickel* (2016) 2 Cal.5th 181, 198 (*Mickel*).)

The identification evidence against Zapata was overwhelming. Gregory testified that he had a clear view of Zapata on the night of the shooting and spoke with him briefly before any weapon was drawn. Immediately after the shooting, he told his family San Junero had shot him. Arianna and Gregory both identified photos of Zapata as the person they knew as San Junero. They knew San Junero socially and he had visited Gregory's home twice in the days preceding the shooting. Arianna believed "San Junero" meant "someone from San Jose," and Zapata's brother confirmed Zapata was born in San Jose. Finally, both Arianna and Gregory identified Zapata in court. Gregory was at all times certain Zapata was the person who had shot him.

Based on the foregoing, there is no reasonable probability the verdict would have been different, even if the defense expert had testified regarding other cases in which eyewitness identification was subsequently refuted by DNA evidence, or the photo array was suppressed, or the jury was instructed on suggestive photo identification procedures, or even if all of the above had occurred. Accordingly, Zapata's claim of ineffective assistance of counsel fails. (*Woodruff, supra,* 5 Cal.5th at p. 736; *Mickel, supra,* 2 Cal.5th at p. 198.)

II. Jail Phone Call

Zapata contends the trial court prejudicially erred in admitting a jail phone call in which an unidentified female told Zapata she ran into someone who knew him as "San Jonedo." Zapata contends the call did not qualify as an adoptive admission because it was not made under circumstances that called for a response if the statement was untrue. We disagree.

The law pertaining to adoptive admissions is well settled. "Evidence of a statement offered against a party is not made inadmissible by the hearsay rule if the statement is one of which the party, with knowledge of the content thereof, has by words or other conduct manifested his adoption or his belief in its truth." (Evid. Code, § 1221.) " ' "[A] typical example of an adoptive admission is the accusatory statement to a

criminal defendant made by a person *other* than a police officer, and defendant's conduct of silence, or his words or equivocal and evasive replies in response. With knowledge of the accusation, the defendant's conduct of silence or his words in the nature of evasive or equivocal replies lead reasonably to the inference that he believes the accusatory statement to be true." [Citation.]' [Citation.] 'For the adoptive admission exception to apply, however, a direct accusation in so many words is not essential.' [Citation.] ' "When a person makes a statement in the presence of a party to an action under circumstances that would normally call for a response if the statement were untrue, the statement is admissible for the limited purpose of showing the party's reaction to it. [Citations.] His silence, evasion, or equivocation may be considered as a tacit admission of the statements made in his presence." ' " (*People v. Jennings* (2010) 50 Cal.4th 616, 661 (*Jennings*).) " 'To warrant admissibility, it is sufficient that the evidence supports a reasonable inference that an accusatory statement was made under circumstances affording a fair opportunity to deny the accusation; whether defendant's conduct actually constituted an adoptive admission becomes a question for the jury to decide.' " (*People v. Geier* (2007) 41 Cal.4th 555, 590 (*Geier*), abrogated on another ground by *Melendez-Diaz v. Massachusetts* (2009) 557 U.S. 305.)

Here, a person other than a police officer informed Zapata she had run into someone who knew him, and that person identified Zapata by the nickname "San Jonedo." Zapata did not refute the identification, stating only, "Who said that?" and then acknowledging he knew the person who had made the identification. This response may be considered a tacit admission to the identification and the conversation was admissible for that purpose. (*Jennings, supra,* 50 Cal.4th at p. 661; *Geier, supra,* 41 Cal.4th at p. 590.) Whether the response actually constituted an admission was a matter for the jury to decide. (*Geier, supra,* at p. 590.) Accordingly, we reject Zapata's claim of error in the admission of the jail phone call.

In any event, as stated above, the evidence of identity was overwhelming even absent this phone call. Thus, even if the call was erroneously admitted, it was not prejudicial. (*People v. Partida* (2005) 37 Cal.4th 428, 439 (*Partida*) [absent fundamental unfairness, state law error in admitting evidence is subject to the prejudice test articulated in *People v. Watson* (1956) 46 Cal.2d 818, 836].)

III. Firearm Enhancement

Senate Bill No. 620, signed by the Governor on October 11, 2017, and effective January 1, 2018, added the following language to the firearm enhancement provisions in sections 12022.5 and 12022.53:

> "The court may, in the interest of justice pursuant to Section 1385 and at the time of sentencing, strike or dismiss an enhancement otherwise required to be imposed by this section." (§§ 12022.5, subd. (c), 12022.53, subd. (h); Stats. 2017, ch. 682, § 1.)

The new legislation thus granted trial courts new discretion to strike firearm enhancements arising under sections 12022.5 and 12022.53.

Here, the trial court imposed a firearm enhancement of 25 years to life under section 12022.53, subdivision (d) and imposed and stayed a sentence of 10 years for a firearm enhancement under section 12022.5, subdivision (a). The People concede Senate Bill No. 620's amendments to sections 12022.5 and 12022.53 are retroactively applicable to this case under *In re Estrada* (1965) 63 Cal.2d 740, 745 (*Estrada*), because they potentially mitigate punishment. (See *People v. Woods* (2018) 19 Cal.App.5th 1080, 1090-1091 [applying Senate Bill No. 620 to case not yet final when law became effective], *People v. Robbins* (2018) 19 Cal.App.5th 660, 678-679 [same].)

Nonetheless, the People contend remand is not required because the court found no factors in mitigation and imposed the maximum sentence on each count. However, in imposing the then-mandatory consecutive sentence of 25 years to life for the firearm enhancement on count 1, the trial court did not say anything indicating it would have imposed the firearm enhancement even if it had discretion to strike it. The court likewise

made no such statement regarding the stayed sentence of 10 years for the firearm enhancement on count 2. Accordingly, we will remand for the trial court to consider whether to exercise its discretion to strike the firearm enhancements. (See *People v. Gutierrez* (2014) 58 Cal.4th 1354, 1391 (*Gutierrez*) [remanding where the record "[does] not clearly indicate that [the trial court] would have imposed the same sentence had [it] been aware of the full scope of [its] discretion"].)

IV. Prior Serious Felony Enhancement

The trial court enhanced Zapata's sentence by five years pursuant to section 667, subdivision (a). At the time, the court lacked discretion to do otherwise. As the applicable statutes then read, the court was required to impose a five-year consecutive term upon "any person convicted of a serious felony who previously ha[d] been convicted of a serious felony" (§ 667, former subd. (a)(1)), and it had no authority "to strike any prior conviction of a serious felony for purposes of enhancement of a sentence under Section 667" (§ 1385, former subd. (b)).

Senate Bill No. 1393 removed these restrictions, effective January 1, 2019. As Zapata's case is not yet final, the People concede the amendments to sections 667, subdivision (a) and 1385, subdivision (b) apply to him. Nonetheless, the People contend remand is not required because the court would not have stricken the enhancement. As with the firearm enhancement, we find no statement indicating the trial court would have imposed this enhancement even if it had discretion to do otherwise. Accordingly, we will remand for the trial court to consider whether to exercise its discretion to strike the prior serious felony enhancement. (See *Gutierrez, supra,* 58 Cal.4th at p. 1391.)

V. Future Youth Offender Parole Hearings

In 2013, the Legislature enacted Senate Bill No. 260, codified in section 3051. (*People v. Franklin* (2016) 63 Cal.4th 261, 276 (*Franklin*).) This statute provides for youth offender parole hearings that guarantee juvenile offenders a meaningful opportunity for release on parole. (§ 3051, subd. (e).) Juvenile offenders who committed

a "controlling offense" prior to reaching a specified age are entitled to a parole hearing after serving a designated period in custody. (§ 3051, subd. (b).) The "controlling offense" is "the offense or enhancement for which any sentencing court imposed the longest term of imprisonment." (§ 3051, subd. (a)(2)(B).)

As originally enacted, section 3051 applied where the controlling offense was committed before the offender was 18 years old. (*In re Trejo* (2017) 10 Cal.App.5th 972, 981 & fn. 6 (*Trejo*).) By an amendment that became effective on January 1, 2016, the Legislature extended the availability of youth offender parole hearings to offenders who were under 23 years old when they committed their controlling offenses. (Stats. 2015, ch. 471, § 1 (Sen. Bill No. 261); see *Trejo, supra,* at p. 981 & fn. 6.) By a subsequent amendment that became effective January 1, 2018, the Legislature further extended the availability of youth offender parole hearings to offenders who were under 25 years old when they committed their controlling offenses. (§ 3051, subd. (b); Stats. 2017, ch. 675, § 1 (Assem. Bill No. 1308).)

Our Supreme Court has concluded that youthful offenders should have an opportunity in the trial court to make "an accurate record of the juvenile offender's characteristics and circumstances at the time of the offense so that the Board, years later, may properly discharge its obligation to 'give great weight to' youth-related factors . . . in determining whether the offender is 'fit to rejoin society' despite having committed a serious crime . . . ." (*Franklin, supra,* 63 Cal.4th at p. 284; see *People v. Perez* (2016) 3 Cal.App.5th 612, 619.) Where such opportunity was not afforded, our Supreme Court has endorsed a limited remand procedure for purposes of making an appropriate record. (*Franklin, supra,* 63 Cal.4th at p. 284.)

Here, Zapata was 20 years old at the time he committed his controlling offense. He will be eligible for release at a youth offender parole hearing during his 25th year of

incarceration.[6] (§ 3051, subd. (b)(3).) Despite recognizing the applicability of section 3051, the trial court refused to permit Zapata an opportunity to make a record of youth-related factors relevant to his eventual youth offender parole hearing, instead determining that such factors did not present "legal issues" and that any future parole determination should be based on increased growth or maturity Zapata demonstrated at the time of such future hearing. The court's determination is contrary to *Franklin, supra,* 63 Cal.4th at p. 284.

Based on the foregoing, the court on remand must permit Zapata an opportunity to make a record relevant to his eventual youth offender parole hearing.

DISPOSITION

The judgment is affirmed. The matter is remanded to the trial court with directions to exercise its discretion under Penal Code sections 12022.5, subdivision (c), and 12022.53, subdivision (h), as amended by Senate Bill No. 620 (Stats. 2017, ch. 682, §§ 1, 2, eff. Jan. 1, 2018), and Penal Code sections 667, subdivision (a)(1) and 1385, subdivision (b), as amended by Senate Bill No. 1393 (Stats. 2018, ch. 1013, §§ 1-2, eff. Jan. 1, 2019), and, if appropriate following exercise of that discretion, to resentence Zapata accordingly. If the trial court resentences Zapata, it shall prepare an amended abstract of judgment that reflects the new sentence and shall transmit a certified copy of same to the appropriate authorities. Additionally, on remand, the trial court shall afford Zapata an opportunity to make a record of information relevant to his eventual youth offender parole hearings.

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[6] If the court elects on remand to strike the firearm enhancement, Zapata will be eligible for release at a youth offender parole hearing during his 15th year of incarceration, unless he is released sooner pursuant to other statutory provisions. (§ 3051, subd. (b)(1).)

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SNAUFFER, J.

I CONCUR:

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DESANTOS, J.

DETJEN, Acting P.J., Concurring.

I concur in the majority's holdings that ineffective assistance of counsel has not been established, the admission of the victim's identification of Zapata was not error, the admission of the jail phone call was not error, and Zapata should have been given the opportunity in the trial court to make an accurate record of his characteristics and circumstances at the time of the offense as required by *People v. Franklin* (2016) 63 Cal.4th 261 (*Franklin*).

I also concur in the conclusion that remand for the exercise of discretion and possible resentencing under Senate Bills Nos. 620 and 1393 is appropriate. I do so, however, only because we are remanding for a *Franklin* hearing. Since my reasoning conflicts with my colleagues' analysis, I write separately.

Zapata was sentenced on May 12, 2017. The trial court had discretionary sentencing choices. On count 1, the court had discretion to impose a five-, seven-, or nine-year prison term for attempted murder. (Pen. Code, § 664, subd. (a).)[1] It chose the upper term of nine years. On count 2, the court had discretion to impose two, three, or four years for assault with a firearm. It chose the upper term of four years. (§ 245, subd. (a)(2).) On count 3, the court had discretion to impose 16 months, two years, or three years for felon in possession of a firearm. (§§ 18, 29800, subd. (a)(1).) It chose the upper term of three years. Most notably, the jury returned a true finding on the section 12022.5, subdivision (a) enhancement (personal use of a firearm) on count 2. For that firearm enhancement, the court had discretion to impose a consecutive term of three, four, or 10 years. (§ 12022.5, subd. (a).) It chose the upper term of 10 years.

In exercising its discretion, the trial court stated Zapata was "a serious danger to society." It noted Zapata's "intent and general purpose" was "to shoot and kill" another human being. It found Zapata had exhibited great violence, inflicted great bodily injury,

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[1] Further statutory references are to the Penal Code.

engaged in planning, had a criminal record of violent conduct, had numerous prior convictions increasing in seriousness, and had performed poorly on prior parole or probation. It expressly found no factors in mitigation. The court stayed the sentence on counts 2 and 3, finding the conduct, intent, and purpose underlying those counts were the same as those as to count 1.

The Attorney General asserts the trial court's sentencing choices and statements at sentencing clearly indicate it would not dismiss the firearm enhancements or prior serious felony enhancement even if it had discretion to do so.

Were it not for the impending *Franklin* hearing, I would agree with the Attorney General. The trial court had discretion on the firearm enhancement in count 2. The conduct in count 2 was the same as count 1. As to that firearm enhancement, the court exercised its discretion to impose the maximum term. Clearly, it would not have stricken that enhancement if it had, at the time of the sentencing, the discretion to do so.

Nevertheless, the majority remands so the trial court can consider whether to exercise its Senate Bill No. 620 discretion to strike the firearm enhancement, and to exercise its Senate Bill No. 1393 discretion to strike the prior serious felony conviction enhancement. They do so because the court did not state, at sentencing, that it would have imposed those enhancements even if it had the discretion to do otherwise. They cite to *People v. Gutierrez* (2014) 58 Cal.4th 1354, 1391 (*Gutierrez*). (Maj. opn., *ante*, pp. 15-16.)

I do not agree with either the majority's narrow view of *Gutierrez* or their low bar for sentencing remands notwithstanding a trial court's stated reasons for a given sentence.

In *Gutierrez*, the issue concerned the proper interpretation of section 190.5, subdivision (b), which permitted trial courts to sentence certain juvenile offenders who committed special circumstance murder to prison either for life without the possibility of parole (LWOP) or for 25 years to life. Prior appellate authority had construed the

statute's language as creating a presumption in favor of LWOP. The California Supreme Court held this was incorrect, and that instead the statute conferred discretion on trial courts to impose either sentence, with no such presumption. (*Gutierrez, supra*, 58 Cal.4th at p. 1360.)

In determining the proper disposition, the state high court observed: " 'Defendants are entitled to sentencing decisions made in the exercise of the "informed discretion" of the sentencing court. [Citations.] A court which is unaware of the scope of its discretionary powers can no more exercise that "informed discretion" than one whose sentence is or may have been based on misinformation regarding a material aspect of a defendant's record." [Citation.] In such circumstances, we have held that the appropriate remedy is to remand for resentencing unless the record 'clearly indicates[s]' that the trial court would have reached the same conclusion 'even if it had been aware that it had such discretion.' " (*Gutierrez, supra*, 58 Cal.4th at p. 1391.)

To avoid remand, *Gutierrez* requires a clear indication, not an express statement, of how the trial court would have sentenced a defendant had it known the scope of its discretionary powers. It does not set so high a standard that it has the effect of mandating remand in virtually all cases in which the issue arises. Yet, the majority seems to endorse just such a standard. With respect to the issue addressed in *Gutierrez*, moreover, it was always clear sentencing judges had at least some measure of discretion. In such circumstances, it might be logical to expect a sentencing judge to state he or she would impose a sentence of LWOP even absent any presumption. By contrast, Senate Bills Nos. 620 and 1393 grant discretion that previously did not exist. It would be illogical to expect a judge imposing a firearm enhancement or prior serious felony conviction enhancement before enactment of those bills to state what he or she would do if discretion that did not exist, instead did exist. Thus, reviewing courts must look to the entire record of sentencing to ascertain whether the requisite clear indication exists.

In light of the trial court's deliberate choice of the highest possible term for the firearm enhancement in count 2 and for each crime Zapata committed, its comments regarding the circumstances of those crimes and Zapata's criminal history, and its express finding no factor in mitigation exists, there is, on the record as it currently stands, no possibility that on remand the court will choose to strike either the firearm enhancements or the prior serious felony conviction enhancement. Ordering such a remand would be an idle act and I would oppose such a disposition were we not, as I have stated, already remanding the matter for a *Franklin* hearing. Because we have no way of knowing whether information pertinent to the trial court's exercise of discretion under Senate Bills Nos. 620 and 1393 will be presented in the *Franklin* hearing, I concur in the majority's conclusion a remand is appropriate so the trial court can exercise its new discretion under those bills.

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DETJEN, Acting P.J.